(3)

No. 91-46

Supreme Court, U.S.
FILED
SEP 9 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL MEDIATION BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

WILLIAM KANTER
MARC RICHMAN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

RONALD M. ETTERS
General Counsel
National Mediation Board
Washington, D.C. 20572

QUESTION PRESENTED

Whether the National Mediation Board's refusal to release petitioner from mediation violated the Railway Labor Act, 45 U.S.C. 151 *et seq.*

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	11
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Brotherhood of R.R. Trainmen v. *Jacksonville Terminal Co.*, 394 U.S. 369 (1969)	3
Chicago & N.W. R.R. v. *United Transp. Union*, 402 U.S. 570 (1971)	16
Delaware & Hudson Ry. v. *United Transp. Union*, 450 F.2d 603 (D.C. Cir.), cert. denied, 403 U.S. 911 (1971)	12
Detroit & Toledo Shore Line R.R. v. *United Transp. Union*, 396 U.S. 142 (1969)	2, 3, 15, 16
General Committee of Adjustment v. *Missouri-Kansas-Texas R.R.*, 320 U.S. 323 (1943)	2
International Ass'n of Machinists & Aerospace Workers v. *NMB*, 425 F.2d 527 (D.C. Cir. 1970)	5, 6, 11, 14, 16
Local 808, Building Maintenance, Serv. & R.R. Workers v. *NMB*, 888 F.2d 1428 (D.C. Cir. 1989)	5-6, 11, 12, 13, 15, 19
Maine Central R.R. v. *Brotherhood of Maintenance of Way Employees*, 873 F.2d 425 (1st Cir. 1989)	5
Pennsylvania R.R. v. *Railroad Labor Board*, 261 U.S. 72 (1923)	2
Switchmen's Union v. *NMB*, 320 U.S. 297 (1943)	5
Trans World Airlines, Inc. v. *Independent Federation of Flight Attendants*, 489 U.S. 426 (1989)	12
Virginian Ry. v. *System Federation No. 40*, 300 U.S. 515 (1937)	2
Wilson v. *New*, 243 U.S. 332 (1917)	5

Statutes and regulation: Page

Act of Apr. 12, 1967, Pub. L. No. 90-10, 81 Stat. 12 5
Act of Aug. 21, 1986, Pub. L. No. 99-385, § 1, 100 Stat. 819 5
Act of Sept. 9, 1988, Pub. L. No. 100-429, § 1, 102 Stat. 1617 5
Act of Apr. 18, 1991, Pub. L. No. 102-29, 105 Stat. 169 8
Arbitration Act of 1888, ch. 1063, 25 Stat. 501 2
National Labor Relations Act, 29 U.S.C. 151-168 2
Railway Labor Act, 45 U.S.C. 151 *et seq.* 2
§ 2, 45 U.S.C. 151a 16
§ 2 First, 45 U.S.C. 152 First 3, 16
§ 2 Second, 45 U.S.C. 152 Second 16
§ 3, 45 U.S.C. 153 3
§ 5, 45 U.S.C. 155 4
§ 5 First, 45 U.S.C. 155 First 8, 18, 19
§ 6, 45 U.S.C. 156 4
§ 10, 45 U.S.C. 160 ..... 4, 16, 17
29 C.F.R.:
Section 1208.3 5
Section 1208.5 5

Miscellaneous:

26 Weekly Comp. Pres. Doc. 713 (May 7, 1990) 8

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-46

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL MEDIATION BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 930 F.2d 45.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 1991. The petition for a writ of certiorari was filed on July 8, 1991. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).[1]

---

[1] In addition to the parties named in the caption, the National Railway Labor Conference, which represents the railroads and was an appellee below, is a respondent in this Court.

STATEMENT

1. In the Railway Labor Act, 45 U.S.C. 151 *et seq.*, Congress created the National Mediation Board (NMB or Board) and vested it with broad discretion to mediate labor disputes in the railroad and airline industries. Petitioner brought this action seeking to overturn the NMB's decision not to release petitioner from mediation, thereby postponing petitioner's ability to engage in a strike against the railroads whose employees it represents.

2. Railroad industry employees became organized earlier than employees in many other industries, and the labor relations problems of the railroad industry had a particularly great impact upon interstate commerce. See generally *Pennsylvania R.R.* v. *Railroad Labor Board*, 261 U.S. 72 (1923); *Virginian Ry.* v. *System Federation No. 40*, 300 U.S. 515 (1937). Beginning with the Arbitration Act of 1888, ch. 1063, 25 Stat. 501, and culminating with the enactment of the Railway Labor Act (RLA) in 1926, Congress enacted specific statutes to address labor relations problems in the railroad industry. See *General Committee of Adjustment* v. *Missouri-Kansas-Texas R.R.*, 320 U.S. 323, 328-329 & n.3 (1943).

The central purpose of the RLA is to avoid strikes and management actions that could lead to strikes. *Detroit & Toledo Shore Line R.R.* v. *United Transp. Union*, 396 U.S. 142, 148-149 (1969). Unlike the National Labor Relations Act, 29 U.S.C. 151-168, and other federal statutes that limit the way in which strikes, lockouts, and other labor actions can be conducted, the RLA does not prescribe rules governing the nature of self-help. Rather, the RLA attempts to avoid interruptions of interstate commerce by establishing a machinery of mediation and conciliation.

396 U.S. at 150. The RLA achieves this goal by establishing what may be a prolonged procedure, which has been described by this Court as "an almost interminable process." *Id.* at 149.

To avoid interruptions of interstate commerce, the Act imposes upon the parties an obligation to "exert every reasonable effort" to negotiate a settlement, 45 U.S.C. 152 First, and provides a detailed framework to facilitate voluntary settlement of "major disputes." [2] Generally, the RLA requires the parties to resolve their differences themselves, and, if that process fails, the NMB may mediate the dispute. This Court has summarized the procedure:

> A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. § 6. The parties must confer, § 2 Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. § 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5 First, 7.

Brotherhood of R.R. Trainmen v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969).

---

[2] The Act divides railroad labor-management disputes into "major" and "minor" disputes, and treats each kind differently. "Major" disputes, of which this matter is an example, are those that involve creating or changing collective bargaining agreements. "Minor" disputes involve such issues as the interpretation of collective bargaining agreements. Minor disputes are subject to compulsory arbitration by the National Railroad Adjustment Board or another statutory alternative. See 45 U.S.C. 153. Major disputes are resolved in the manner outlined in the text.

The coercive provisions of this procedure are contained in Sections 5 and 6 of the Act, 45 U.S.C. 155 and 156, which provide that neither party may engage in self-help until 30 days after a party has declined the Board's proffer of arbitration. See *Shore Line*, 396 U.S. at 150. The NMB's primary statutory power over the process of mediation, therefore, is the authority to determine whether and when to release the parties from mediation by proffering arbitration. If the Board determines that mediation will not be successful, it will proffer arbitration; and if the parties do not agree to binding arbitration, they may then engage in self-help, including strikes and lockouts, with all the potential disruption that may follow.

Self-help activities can be further delayed if the NMB determines that a dispute threatens to substantially interrupt interstate commerce by depriving a section of the country of essential transportation service. Upon a notification of such a threat from the NMB, the President may, in the exercise of his discretion, appoint an Emergency Board to investigate the dispute and report to the President. RLA § 10, 45 U.S.C. 160. The Emergency Board is given thirty days to investigate the dispute and report its findings to the President. During this time period, and for an additional thirty day "cooling-off" period after submission of the Emergency Board's report, the parties are required to observe the *status quo*, unless they mutually agree to new terms. *Ibid.* The procedures of the RLA end only after the completion of these steps; it is at that point that the parties are free to engage in self-help activities.[3]

---

[3] Conclusion of the RLA procedures does not necessarily terminate efforts by the government to settle the dispute and

3. The National Mediation Board is the fulcrum of the mediation and conciliation process. Consequently, Congress took "great pains" to avoid any impairment of the NMB's usefulness in settling disputes. *Switchmen's Union* v. *NMB*, 320 U.S. 297, 303 (1943). One of these protections is that the NMB, unlike other federal agencies, does not "make findings, or even statements to the public, for these would undercut its status as a body recognized by both sides as impartial, and would impair its ability to constitute a significant force for conciliation, not only in the particular case, but in general and in the future." *International Ass'n of Machinists & Aerospace Workers* v. *NMB*, 425 F.2d 527, 539 (D.C. Cir. 1970). The NMB's regulations require the Board and its employees to preserve the confidentiality of communications received in the mediation process, as well as all records referring to that process. 29 C.F.R. 1208.3, 1208.5. Recognizing the unique role of the mediator, courts have similarly held that the NMB cannot be required to provide information about its mediation activities other than the "objective facts" of the dispute and mediation. *Local 808, Building Maintenance, Serv. & R.R. Workers* v. *NMB*, 888

---

avoid the disruption to interstate commerce that would follow a rail strike of any magnitude. In the past, Congress has intervened in particular disputes through legislation, either by creating extended cooling-off periods beyond those contained in the RLA, or by imposing the terms of a settlement on the parties. See, *e.g.*, *Wilson* v. *New*, 243 U.S. 332, 340-343 (1917); *Maine Central R.R.* v. *Brotherhood of Maintenance of Way Employees*, 873 F.2d 425, 426-428 (1st Cir. 1989). See also Pub. L. No. 90-10, 81 Stat. 12 (1967); Pub. L. No. 99-385, § 1, 100 Stat. 819 (1986); Pub. L. No. 100-429, § 1, 102 Stat. 1617 (1988).

F.2d 1428, 1435 (D.C. Cir. 1989); *Machinists*, 425 F.2d at 540.[4]

4. This action arose out of a nationwide collective bargaining dispute involving virtually all of the nation's major rail carriers and 12 unions, including petitioner. Pet. App. 4a. Petitioner began its part in the labor dispute on January 20, 1988, by serving notice under Section 6 of the RLA of its intent to seek changes in certain rules and working conditions. C.A. App. 5. The railroads, represented by the National Carriers Conference Committee, served counter-notices. C.A. App. 5-6.

After a period of negotiations between the parties, both sides, in October 1988, requested mediation by the Board. Pet. App. 4a. In October 1989, the rail-

---

[4] The discussion of the facts in this brief is, accordingly, based on the bare allegations of the complaint. Although the Board accepts the allegations of the complaint for present purposes, it does not accept the accuracy or completeness of those allegations for other purposes.

We note, however, that petitioner's "Statement of Material Facts As To Which There Is No Genuine Issue" (C.A. App. 136) contains various allegations. Because the district court granted the NMB's motion to dismiss—and because it was unnecessary for purposes of that motion—the Board has not replied to that Statement, or even filed an Answer to the Complaint. The Board does not accept the allegations in the Statement or in the Declarations filed by petitioner's officers (C.A. App. 14-19, 27-33). Prior similar allegations have not been answered because the NMB has determined that it "would not contribute positively to the mediatory process" to issue a "detailed rebuttal" to petitioner's statements regarding private discussions between Chairman Javits and petitioner's officers. C.A. App. 26. Under the circumstances, petitioner's statement (Pet. 8) that Chairman Javits "unashamedly admitted" that petitioner's refusal to waive its right to strike formed the basis for the Board's refusal to proffer arbitration is clearly inappropriate.

roads and the unions advised the NMB that negotiations were at an unbreakable impasse and requested a proffer of arbitration. The NMB refused, but it intensified mediation, with direct participation by NMB Chairman Javits. In February 1990, Chairman Javits allegedly "admitted to the parties" that mediation "had failed to resolve the dispute." Pet. App. 4a; C.A. App. 6.[5]

On February 21, 1990, petitioner asked the NMB to terminate mediation and proffer arbitration to the parties. While this request was under consideration, the railroads and 11 of the unions that are parties to this national dispute—all except petitioner—entered into a procedural agreement on March 6, 1990, to take several steps to attempt to resolve this labor dispute.

Under the procedural agreement, the unions and the railroads agreed (1) that the Emergency Board should proceed with an investigation of the issues concerning health and welfare, and wages and rules, in that order; and (2) that the parties would request the Emergency Board to issue its report and recommendations by September 15, 1990 (or a later date, if necessary). They further agreed that the NMB should conduct additional mediation of issues concerning wages and rules.[6] The agreement contem-

---

[5] In keeping with the Board's longstanding practice of not commenting on statements made in mediation, this alleged statement by Chairman Javits has neither been confirmed nor denied by the NMB. However, respondent National Railway Labor Conference denied the allegation below. C.A. App. 130, para. 9.

[6] Even when the mediation process of the RLA has concluded, the NMB will often make its services available to parties requesting them on a purely voluntary basis. In addi-

plated extensions of the *status quo* independent of those required by the RLA; the parties undertook not to engage in self-help until the expiration of the statutory cooling-off period following the Emergency Board's report, and in no event to initiate self-help at any time Congress was not in session. On April 2, 1990, the NMB proffered arbitration to the railroads and the 11 unions that had joined this agreement, thus releasing them from further statutorily mandated mediation. Pet. App. 4a-5a; C.A. App. 8, 30, 108-109.[7]

Petitioner was the only party to the national dispute that did not enter into an agreement with the railroads to continue settlement efforts before the NMB and an Emergency Board. The NMB did not—and has not yet—released petitioner from mediation. Pet. App. 4a-5a.

5. Petitioner filed this lawsuit on April 25, 1990 (C.A. App. 2), a little more than two months after it asked the NMB to proffer arbitration. The NMB moved to dismiss for failure to state a claim upon which relief could be granted, and the district court dismissed the action. Pet. App. 5a; C.A. App. 134,

---

tion, the NMB is authorized to proffer its services whenever a labor emergency exists. RLA § 5 First, 45 U.S.C. 155 First.

[7] On May 3, 1990, President Bush issued an Executive Order (E.O. 12714) convening an Emergency Board to examine the railroad industry collective bargaining dispute. 26 *Weekly Comp. Pres. Doc.* 713-714 (May 4, 1990). The Emergency Board issued its report on January 15, 1991. On April 18, 1991, Congress enacted Pub. L. No. 102-29, 105 Stat. 169, a procedure by which a "Special Board" would be appointed to hear exceptions to the report of the Emergency Board, with the unexcepted recommendations to take effect as if agreed to by the parties. The final reports of the Special Board were issued on July 18, 1991.

199. Although it did not issue a written opinion, the district court observed from the bench that the Board is "not prepared to say at this time * * * that the mediation efforts with respect to [petitioner] are at an impasse," and that the "Board is not obliged to terminate the mediation." C.A. App. 193, 197.

6. The court of appeals affirmed. The court first noted the narrow scope of review, requiring a showing of "patent official bad faith" and reflecting "one of the narrowest [standards] known to the law." Pet. App. 5a-6a. Under this standard, the NMB can be ordered to release a party from mediation only if "the Board continues mediation on a basis that is completely and patently arbitrary and for a period that is completely and patently unreasonable." *Id.* at 6a.

The court of appeals rejected petitioner's claim that the Board's actions reflected "patent bad faith." Pet. App. 6a. The court first disagreed with petitioner's contention that the NMB's bad faith was established by the circumstances regarding the agreement between the other unions and the railroads, including petitioner's suggestion that it was "somehow improper" for the Board to have allegedly consulted with the White House concerning the conditions under which the President would set up an emergency board. *Id.* at 6a-7a.[8]

The court then rejected petitioner's argument—which petitioner had conceded to be "decisive" (Pet. App. 7a n.2)—that patent bad faith was established by NMB Chairman Javits' alleged statement that mediation had failed. The court noted that "[i]t could

---

[8] The NMB has never stated whether it did or did not consult with the White House, although it would not have been improper if it had. See page 16 *infra*.

be said at any stage in a mediation process prior to a successful conclusion of a collective bargaining agreement that mediation up to that point had failed." *Id.* at 7a. But "Congress surely expected the Board to make a judgment as to whether mediation would be unsuccessful *in the future*," before the Board gave up on mediation. *Ibid.* (emphasis added). The court found no basis to conclude that the NMB had given up hope that mediation would still succeed. The court noted that any statement by Chairman Javits that mediation had failed could have been a mediatory "tactic to spur negotiations." *Id.* at 8a.

In addition, the court noted that, because "intrusive judicial scrutiny [of mediation] would likely prolong the dispute," it is "inappropriate ordinarily to review statements by individual members of the Board made in the course of dealing with the parties to determine whether the Board concluded or should have concluded that mediation will not be effective." Pet. App. 8a-9a. The court observed that "Congress, presumably with these considerations in mind, required the Board to notify the parties '*in writing* that its mediatory efforts have failed' after its proffer of arbitration is refused * * *; it is at that point that Congress expected legal significance to attach to Board communications with the parties concerning failure of mediation." *Id.* at 9a.[9]

---

[9] Because the district court considered affidavits, the court of appeals treated its decision as a grant of summary judgment in favor of the Board. Pet. App. 5a n.1.

ARGUMENT

Petitioner contends that the Board should have proffered arbitration and released it from mediation. Pet. 7. Petitioner does not argue that the court of appeals applied an incorrect legal standard; rather, petitioner disagrees with that court's application of the "patent official bad faith" standard. Pet. 8. Petitioner also does not—and could not—argue that the court of appeals' decision conflicts with the decision of any other court. Petitioner thus challenges the court of appeals' case-specific application of a settled legal standard. As a result, petitioner's claim does not warrant review; petitioner's position is, in any event, plainly incorrect.

The governing legal standard is clear. "Absent a showing of patent official bad faith, a court has no authority to review the Board's decision to keep a dispute in mediation." *Local 808*, 888 F.2d at 1434. Any possible remedy would be available only in an "extraordinary and exceptional" case, "if the Board continues mediation on a basis that is completely and patently arbitrary and for a period that is completely and patently unreasonable, notwithstanding the lack of any genuine hope or expectation that the parties will arrive at an agreement." *Machinists*, 425 F.2d at 537, 543. The burden petitioner must carry in order to overturn the NMB's refusal to proffer arbitration is exceedingly heavy. As this Court has explained:

> The RLA provides an exhaustively detailed procedural framework "to facilitate the voluntary settlement of major disputes." * * * The effectiveness of these private dispute resolution procedures depends * * * on the * * * assurance that neither party will be able to enlist the courts to further its own partisan ends.

Trans World Airlines, Inc. v. *Independent Federation of Flight Attendants*, 489 U.S. 426, 441 (1989).[10]

Petitioner raises a series of objections to the Board's decision not to release it from mediation; none is tenable, and none merits review.

1. Petitioner suggests that it has been unjustifiably singled out for special treatment because it refused to join the procedural agreement entered into by all other parties to the dispute. Pet. 7-8. But while the remaining 11 unions and the railroads in these negotiations have been formally released from mediation, they have been released under circumstances that guarantee further settlement activities under the auspices of the Presidential Emergency Board and further voluntary mediation by the NMB. In effect, statutory mediation to those parties was

---

[10] The need for judicial reluctance to intervene in mediation has been repeatedly reiterated. See, *e.g.*, *Local 808*, 888 F.2d at 1436-1437 (Mediation is an "art-form" which "relies heavily on personal powers of persuasion, not adjudication" and which makes it "extremely difficult * * * to measure a mediator's actions in any given negotiation"); *Delaware & Hudson Ry.* v. *United Transp. Union*, 450 F.2d 603, 608 (D.C. Cir.) (the NMB's role is "so sensitive and critical that ordinary doctrines permitting judicial action on a complaint of arbitrary delay and protraction" are insufficient), cert. denied, 403 U.S. 911 (1971); *Machinists*, 425 F.2d at 539 (Reviewing court "must take care to avoid a broad beam of light that destroys a photograph still in process of development.").

Because this case falls far short of the standard of "patent official bad faith," we do not address the question left open in *Delaware & Hudson*, *supra*, whether jurisdiction to review the Board's decision exists "at all." 450 F.2d at 608. As we explained in the lower court, however, it is the Board's position that no such jurisdiction exists. See Gov't C.A. Br. 16 n.10.

transcended—not by resolution of the underlying dispute, but by an arrangement whereby the unions and railroads have agreed to maintain the *status quo* and submit to a form of non-binding arbitration by a blue-ribbon panel, under the watchful eye of Congress, which has acted to intervene in national labor disputes in the past. See note 3, *supra*.

Thus, all parties to the negotiations, save petitioner, agreed that an Emergency Board should be created to review outstanding issues. All parties, save petitioner, agreed that the Emergency Board should first examine and report on health and welfare issues, and then on wage and rules issues. All parties, save petitioner, requested the NMB to continue mediation on wages and rules. All parties, save petitioner, agreed to extend the time period for the Emergency Board to make its investigation and produce its reports, if necessary. All parties, save petitioner, agreed that self-help would not be employed until after a 30-day cooling-off period, and in no event when Congress is out of session.

In contrast, petitioner unilaterally insists on a release from mediation and all RLA processes. Thus, while all the other parties indicated their willingness to continue to seek a resolution of their differences in an arbitration-like setting without resort to self-help, petitioner has declined to join that process. This difference clearly provides objective facts that justify the NMB's decision to treat petitioner differently and to retain petitioner, along with the railroads it is negotiating with, in mediation. As was stated in *Local 808*, 888 F.2d at 1440:

> Often a mediator will let an unusually stubborn party sit with the status quo in place until the party is ready to negotiate seriously, knowing

> that the outcome in other mediations may influence the parties in a related dispute. This is a basic tactic in mediation * * *.

The court of appeals correctly concluded (Pet. App. 8a) that it is likely the potential resolution of various issues by the other unions will influence the resolution of petitioner's disputes. Moreover, that prospect could well spur petitioner to seriously consider settling its disputes in mediation, lest events overtake it. The Board's decision to employ this "basic tactic in mediation" thus is clearly permissible.

Furthermore, other possible sets of facts exist to justify the NMB's decision not to release petitioner from mediation. Petitioner, alone among the many parties to this dispute, now insists that an impasse has been reached and that further settlement efforts are pointless. However sincerely felt, this pronouncement must be viewed skeptically, for a "party that brings a court action may well acquire a stake in showing that mediation won't work." *Machinists*, 425 F.2d at 542. In its request for a proffer of arbitration, moreover, petitioner itself characterized the impasse as "seemingly" insurmountable. C.A. App. 21. A court's function is limited to determining whether successful mediation is at all possible, based on objective facts, no matter how skeptical it may be of a successful result. *Machinists*, 425 F.2d at 541.

In so doing, a court must consider that the NMB may be aware that one or more parties has more flexibility than indicated publicly. While skillful negotiators will portray their latest offer as their final one, the NMB may be more knowledgeable of the party's actual position. As the D.C. Circuit has observed, "[t]he Board will always know things about the parties and their dispute that the court does not

know and can never know." *Local 808*, 888 F.2d at 1436.[11]

Finally, even if petitioner and the other parties had reached their bottom-line negotiating positions, part of the purpose and design of the RLA is to allow the erosive force of time to soften seemingly rigid bargaining positions. *Shore Line*, 396 U.S. at 149-150. Again, the mere fact that the remaining parties have agreed to further proceedings before an Emergency Board and the NMB provides an objective basis for concluding that the impasse seen by petitioner either does not yet exist or has already been broken. Petitioner and the railroads it is negotiating with cannot be oblivious to the Emergency Board and subsequent proceedings.

2. Petitioner also suggests that the Board's decision not to release it from mediation should be overturned because of the Board's alleged role in the procedural agreement reached by the other parties to the negotiations. Pet. 7-8. Petitioner seems to suggest that the procedural agreement is somehow violative of

---

[11] Similarly, a perceived impasse may exist only because a party has yet to engage in negotiations on important issues. Petitioner's own submissions suggest that this possibility is grounded in objective fact. According to petitioner, the railroads had, up to the time of the complaint, refused to negotiate wage and rules issues until all issues concerning health insurance were resolved. C.A. App. 28-29. Under the procedural agreement, however, the parties stipulated to a process in which all issues, including wages and rules, would be investigated by the Emergency Board, and wages and rules were to be the subject of NMB voluntary mediation. Although petitioner's participation in mediation would be separate from and parallel to the Emergency Board proceedings and voluntary NMB mediation, there is no reason to believe mediation here will not be fruitful, as progress on one front influences proceedings on the other.

the RLA and that it would have been somehow improper for the NMB to ascertain the views of the White House regarding whether the President would exercise his discretion to appoint an Emergency Board. Neither contention can support petitioner's claim that the NMB has acted in patent official bad faith.

The procedural agreement is consistent with the intent of the RLA. Petitioner's failure to point to any specific provision of the RLA allegedly violated by the procedural agreement is not surprising, for there is none. In fact, the RLA places an affirmative duty on the unions and the railroads "to exert every reasonable effort to make and maintain agreements." § 2 First, 45 U.S.C. 152 First. This provision imposes an affirmative obligation on the parties. *Chicago & N.W. R.R.* v. *United Transp. Union*, 402 U.S. 570, 577 (1971); *Shore Line*, 396 U.S. at 151-152. The procedural agreement represents the implementation of that affirmative duty in this case. While the RLA creates the lengthy processes before the NMB and potential Emergency Boards, the parties always retain the authority to reach agreements at any stage. RLA § 2 Second, 45 U.S.C. 152 Second (party representatives required to engage in conferences); § 10, 45 U.S.C. 160 (parties may agree to alter *status quo* even during Emergency Board investigation).

More fundamentally, the procedural agreement is entirely consistent with the basic purposes of the RLA. "The major purpose of Congress in passing the Railway Labor Act was to 'provide the machinery to prevent strikes' and the resulting interruptions of interstate commerce." *Machinists*, 425 F.2d at 533, quoting *Shore Line*, 396 U.S. at 148. See also 45 U.S.C. 151a. The procedural agreement obviously

furthers this fundamental goal of the RLA by creating a mutually agreed, arbitration-like procedure to continue efforts at settling this national rail dispute, and may avoid the serious economic disruption that would surely follow from a national rail shutdown.

Nor would there be any impropriety in the NMB's insuring that the President is informed of the parties' positions and ascertaining the willingness of the President to appoint an Emergency Board. The President is not required to create an Emergency Board. 45 U.S.C. 160. Certainly it would be legitimate, for example, for the NMB to determine, as a settlement tactic, that the parties should move to another venue, such as an Emergency Board, thereby creating pressures for settlement. Obviously, were the NMB to contemplate such a step, it would be entirely appropriate for it to ascertain the President's willingness to appoint an Emergency Board.

Furthermore, although the roles of the NMB and the President in RLA procedures may be technically separate, the President's indicated willingness, or lack of willingness, to appoint an Emergency Board if mediation were to fail could well affect mediation and the parties' positions. For example, if the President indicated he would be unwilling to appoint an Emergency Board, it could influence the mediatory position, say, of a union that had threatened to strike, but was not really prepared to do so. A union in that position might lose face if it did not strike as soon as it was allowed. Thus, ascertaining the President's possible response if mediation were to fail would be a legitimate mediatory tactic.[12]

---

[12] To the extent that petitioner seeks to attack the procedural agreement itself (see Pet. 7), we agree with the dis-

3. Citing the NMB's duty to proffer arbitration if its "efforts to bring about an amicable settlement through mediation shall be unsuccessful," RLA § 5 First, 45 U.S.C. 155 First, petitioner (Pet. 7) contends that the Board had no statutory authority to delay the proffer of arbitration to petitioner. The essential premise of petitioner's position is that the Board has impermissibly conditioned petitioner's release from mediation, which petitioner terms as "failed," upon petitioner's "waiver" of its asserted right to immediate self-help. This argument, however, assumes the ultimate issue, i.e., that mediation has failed. The objective facts, including the other parties' agreement to negotiate the wage and rules issues which had, according to petitioner, eluded discussion to date, demonstrate the opposite.

The only evidence petitioner offers to show that mediation has failed is its understanding of Chairman Javits' alleged remarks. Pet. 3, 7. As the court of appeals found, even if these isolated remarks were made, they would be insufficient to support petitioner's claim. This determination is particularly compelling in light of the events subsequent to the date when the Chairman's statement was allegedly made. Since that time, the remaining parties commenced the voluntary efforts to achieve a settlement, which impose new mediatory pressures upon petitioner. These drastically changed circumstances rendered inoperable any conclusions that might previously have been made by the Chairman.

Furthermore, the fact that the NMB's Chairman may have expressed a view that mediation had been unsuccessful as of February 1990, is simply insuffi-

---

trict court's suggestion that petitioner lacks standing to do so. See C.A. App. 193.

cient to carry petitioner's burden of proving patent official bad faith. Assuming such a statement was made, it cannot be transmogrified, as petitioner attempts to do, into an admission that the Chairman had determined that mediation would never succeed and had to be terminated. Cf. *Local 808*, 888 F.2d at 1441. Clearly, as the court below concluded (Pet. App. 8a), it is a legitimate tactic for a mediator to threaten to end discussions in an effort to spur a reluctant party to negotiate seriously. Just as "[a]n NMB member may legitimately indicate an unwillingness to move a dispute out of mediation in order to pressure the parties to settle," *Local 808* 888 F.2d at 1441, so may the NMB legitimately threaten to halt mediation, thereby threatening to move the parties to a different plain with different pressures working toward settlement.

Moreover, even if the Chairman's alleged statements reflected more than mediatory tactics, he is only one of three Board members, and his statements cannot bind the Board. Even if he "admitted" that mediation had failed, that could not be attributed to the other Board Members or the Board as a whole. Petitioner's attribution of the Chairman's alleged statements to "the Board" (Pet. 7) is both factually and legally incorrect.[13] The court of appeals properly refused to give legal significance to these alleged remarks.

---

[13] Whether further mediation is likely to be unsuccessful is determined by a vote of the Members of the NMB, and it is the Board's longstanding policy to notify the parties in writing when it concludes that mediation "shall be unsuccessful." 45 U.S.C. 155, First. Neither event occurred here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

WILLIAM KANTER
MARC RICHMAN
Attorneys

RONALD M. ETTERS
General Counsel
National Mediation Board

SEPTEMBER 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 45067